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IN THE

Supreme Court of the United States

NEIL RANDALL, *et al.*,
Petitioners,

v.

WILLIAM H. SORRELL, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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BRIEF OF THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

The American Federation of Labor and Congress of Industrial Organizations ("AFL-CIO"), a federation of 53 national and international labor organizations with a total membership of nine million working men and women, files this brief *amicus curiae* in support of Petitioners with the consent of the parties as provided for in the Rules of this Court.[1]

[1] No counsel for a party authored this brief *amicus curiae* in whole or in part, and no person or entity, other than the *amicus*, made a monetary contribution to the preparation or submission of this brief.

INTEREST OF *AMICUS*

The Vermont Campaign Finance Law ("VCFL"), see 17 V.S.A. § 2809(a), like the Federal Election Campaign Act ("FECA"), see 2 U.S.C. § 441a(a)(7)(B)(i), and the campaign finance laws of many states enforces a rule that activity that is coordinated with a candidate is treated as an in-kind contribution to that candidate. As a plaintiff in *McConnell v. Federal Election Commission*, 540 U.S. 93 (2003) (No. 02-1755), and as an *amicus curiae* in other courts, *see, e.g., Federal Election Commission v. Christian Coalition, Inc,* 52 F. Supp. 2d 45 (D.D.C. 1999), the AFL-CIO has addressed issues of coordination regulation in order to protect its ability and that of other labor organizations to engage with legislators and elected executive branch officials and advance the interests of workers and their families in the public arena. Because those officials are often or always "candidates" under applicable campaign finance law, it is vital to distinguish between the exercise of the right to petition, which is core First Amendment activity, and conduct comprising coordination with a candidate, which, as a form of contribution, enjoys less First Amendment protection and is subject, under FECA and many state campaign finance laws, to either strict source prohibitions (including as to labor organizations), limits (including as to labor organization-sponsored political committees), or both.

It is just as vital for the AFL-CIO, other labor organizations and their political committees to distinguish between coordination with a candidate and independent electoral expression, which is core First Amendment speech, and to protect those who engage in electoral activity from overly restrictive standards as to what conduct comprises coordination. The case at bar presents a challenge to a state law provision that implicates both these right-to-petition and electoral-speech concerns. The "related campaign expenditure" rule in the VCFL, 17 V.S.A. § 2809(d), establishes a

"presum[ption]" that an "expenditure," by a political party or a political committee that recruits or endorses candidates, that "primarily benefits" six or fewer Vermont state candidates who are "associated" with that spender, is both intended to promote the election or defeat of one or more of those candidates and is coordinated with them. If this presumption goes unrebutted, then the expenditure is subject to the VCFL's low candidate contribution and unique candidate expenditure limits.

This presumption serves no governmental interest and unduly chills the exercise of First Amendment rights of individuals and groups, and a decision upholding it would mark an unwarranted departure from established First Amendment law concerning burdens of proof in litigation. This provision in the VCFL has garnered much less attention in this litigation than the issues of direct candidate contribution and expenditure limits (which we do not address), and the Court of Appeals below upheld the presumption with but cursory analysis. See *Landell v. Sorrell*, 382 F. 3d 91, 145-46 (2004). But this is an issue of substantial importance in its own right, for its effect is to impose, incompatibly with the First Amendment, a risk on political committees and political parties that their speech undertaken independently of candidates will be subjected to governmental limits applicable only to contributions.

THE "RELATED CAMPAIGN EXPENDITURE" PROVISIONS OF THE VERMONT CAMPAIGN FINANCE LAW

Under the rubric "Accountability for related expenditures," see 17 V.S.A. § 2809, the VCFL defines and regulates a form of electoral spending termed a "related campaign expenditure made on the candidate's behalf." See 17 V.S.A. § 2809(c).[2]

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[2] A "candidate" is an individual who has either accepted "contributions" or made "expenditures" of at least $500.00, filed a nominating

This kind of "expenditure" consists of two elements: first, it is intended either to promote the election of a specific candidate or group of candidates, or to defeat an opposing candidate or group of candidates; and, second, it is "facilitated by, solicited by or approved by the candidate or the candidate's political committee." *Id.*[3] The latter element codifies Vermont's version of "coordination," and regulations issued by the Vermont Secretary of State require the candidate or her committee to act consciously and not accidentally in order that this element be met. *See* Administrative Rule 2000-1, "Vermont Campaign Finance Law Regulation of Related Expenses" ("Rule 2000-1"), Sec. 2(b)-(d).[4] And, while Rule 2000-1 eschews a requirement of "specific intent" by a candidate or his political committee that a third-party expenditure be "related," it requires that the candidate or his committee have either "some knowledge . . . or willful blindness" of the fact that the expenditure will be made on the candidate's behalf. *Id.*, Sec. 2(a).

The making of a "related campaign expenditure" triggers two significant consequences. First, the "related campaign expenditure . . . shall be considered a contribution to the

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petition, been nominated by a primary or caucus, or announced that he or she seeks elective office. 17 V.S.A. § 2801(1). An "expenditure" includes "a payment, disbursement, distribution, advance, deposit, loan or gift of money or anything of value, paid or promised to be paid, for the purpose of influencing an election or supporting or opposing one or more candidates." 17 V.S.A. § 2801(3).

[3] The only exception to this definition is an expenditure under $100.00 for "refreshments and related supplies" for "a campaign event whose purpose was to provide a group of voters with the opportunity to meet the candidate personally." 17 V.S.A. § 2809(d)(1)–(3).

[4] The VCFL explicitly confers authority on the Secretary of State "to adopt rules necessary to administer [§ 2809]," see 17 V.S.A. § 2809(f), so Rule 2000-1 is an authoritative construction of the statute by the authorized official. *See generally Lemieux v. Tri-State Lotto Commission*, 164 Vt. 110, 112-13 (1995).

candidate on whose behalf it was made." 17 V.S.A. § 2809(a). This in turn subjects the expenditure to Vermont's extremely low contribution limits, namely, $400 per two-year election cycle to a statewide candidate; $300 per cycle to a state senate or county candidate; and $200 per cycle to a state representative or local candidate. See 17 V.S.A. § 2805(a). These limits pertain to contributions from a "single source,"[5] "political committee" or "political party." *Id.*

Second, a "related campaign expenditure" that exceeds $50 "shall be considered an expenditure by the candidate on whose behalf it was made." 17 V.S.A. § 2809(b). This in turn subjects the expenditure to Vermont's unique candidate expenditure limits, namely, $300,000 per two-year election cycle by a gubernatorial candidate; $100,000 per cycle by a lieutenant-governor candidate; $45,000 per cycle by any other statewide candidate; $4,000–$6,500 per cycle by a state-senate candidate; $4,000 per cycle by a county candidate; and $2,000–$3,000 by a state-representative candidate. See 17 V.S.A. § 2805a(a).

To this point, and leaving aside the issues as to whether Vermont's candidate contribution and expenditure limits are themselves constitutional, it may be assumed for purposes of this case that the VCFL's treatment of "related campaign expenditures" is constitutional and generally consistent with coordination regulations in other jurisdictions. Vermont, however, uniquely also dictates that a special burden of proof shall apply in disputes over whether coordination has occurred:

> An expenditure made by a political party or by a political committee that recruits or endorses candidates, that primarily benefits six or fewer candidates who are

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[5] A "single source" includes "an individual, partnership, corporation, association, labor organization or any other organization or group of persons which is not a political committee or political party." 17 V.S.A. § 2801(6).

> associated with the political party or political committee making the expenditure, is presumed to be a related expenditure made on behalf of those candidates.

17 V.S.A. § 2809(d).[6] An expenditure "primarily benefits" six or fewer candidates if its "principal purpose" is to do so. Rule 2000-1, Sec. 3(a). Notably, a "political committee" subject to this presumption includes not only an entity that performs exclusively electoral functions in Vermont, but also other, principally non-political entities that undertake at least $500 worth of electoral activity in the state. See 17 V.S.A. § 2801(4).[7]

Regarding how the presumption is litigated, Rule 2000-1, Sec. 3(d) provides that when the presumption attaches, it "can

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[6] This provision also states that such a presumption does *not* apply to an expenditure by a political party or a political committee that "substantially benefits more than six candidates and facilitates party or political committee functions, voter turnout, platform promotion or organizational capacity . . ." 17 V.S.A. § 2809(d). The statute is silent about whether the presumption applies to other political party and political committee expenditures; although we assume that this silence means that no such presumption attaches to them either, it is unclear why the VCFL specifically denies that the presumption applies to any particular kinds of expenditures.

[7] Thus, the VCFL defines "political committee" to include "any formal or informal committee of two or more individuals, *or a corporation, labor organization, public interest group, or other entity*, not including a political party, which receives contributions *of more than $500.00* or makes expenditures of more than $500.00 in any one calendar year for the purpose of supporting or opposing one or more candidates, influencing an election, or advocating a position on a public question in any election or affecting the outcome of an election." 17 V.S.A. § 2801(4). Vermont added the italicized language in 2005; the previous eligibility for "political committee" status of the entities referenced in that language was at least implicit, inasmuch as the VCFL imposes no source prohibitions on contributions. See 17 V.S.A. §§ 2801(6), 2805(a); Office of the Secretary of State, "Guide to Vermont's Campaign Finance Law" iii, 15, 18 (Sept. 2005), http://vermont-elections.org/elections1/2005CFGuide1129rev.pdf.

be overcome by evidence that the elements of the definition in Section 2809(c)"—that is, the spender's election outcome-influencing intent *and* the spender's coordination with one or more candidates—"were not met" or that "the elements in 2809(d)(1-3)"—that is, the exception for under-$100 refreshments at meet-the-candidate events—"apply." And, as described above, if the presumption is not overcome, then the expenditure is treated as a contribution to and an expenditure by the candidates who are "benefited" by it.

Litigation that triggers the presumption may be initiated by either the state or a candidate. A state's attorney or the state attorney general may institute actions for injunctive and other relief to restrain or abate a violation of the VCFL, including a breach of its contribution and expenditure limits that results from the making of a "related campaign expenditure." See 17 V.S.A. § 2806(c). Alternatively, a candidate may initiate accelerated litigation over whether such an expenditure was coordinated with an opposing candidate, who, if it was, must be treated as having received a contribution and made an expenditure: "A candidate may seek a determination that an expenditure is a related expenditure made on behalf of an opposing candidate"—that is, an individual who is "seeking the same office," Rule 2000-1, Sec. 5, meaning either the complaining candidate's primary or general election opponent or a candidate seeking a different party's nomination—"by filing a petition with the superior court of the county where either candidate resides." 17 V.S.A. § 2809(e). Within 24 hours of that filing, the court must schedule a hearing, and the case must both take precedence over all but "cases the court considers of greater importance" and be tried "at the earliest practicable date and expedited in every way." *Id.*

The defendant in any such proceeding may be a political party, a political committee, a candidate, or all of them, for culpability potentially lies for both the making and the receipt of an unlawfully excessive contribution (and, for a candidate,

for making unlawfully excessive expenditures), and the VCFL imposes up to a $10,000 civil penalty against any violator of the statute. See 17 V.S.A. § 2806(b). Moreover, a candidate who violates the VCFL and who opted for public financing of his candidacy, see 17 V.S.A. §§ 2851-56, must refund to the state the unspent balance of the state campaign finance grants he received up to the date of the violation, see 17 V.S.A. § 2806(b)—a potentially campaign-ending penalty.

Finally, in some cases, the presumption may attach at the outset of a lawsuit. The court's "findings and determinations" in a candidate-brought action constitute "prima facie evidence in any proceedings brought for violations of [§ 2809]." 17 V.S.A. § 2809(e). This apparently means, for example, that if the defendant in such a case—say, an opposing candidate to the candidate-plaintiff—loses because she failed to rebut the presumption, then in a subsequent proceeding brought by either the same candidate-plaintiff or by the state against the political committee or political party that made the now-adjudicated "related campaign expenditure," the subsequent-case plaintiff is relieved of his initial burden of production, for a "prima facie case" on the merits is deemed to have been made, placing the presumption on the defendant immediately upon the filing of the new action.

SUMMARY OF ARGUMENT

1. The Vermont Campaign Finance Law imposes a burden of persuasion on a defendant political committee, political party or candidate to demonstrate that an "expenditure" by a committee or party, including speech about candidates or an election, was not a "related campaign expenditure," that is, intended to influence the election or defeat of six or fewer candidates and coordinated with a candidate. This presumption imposes a burden on both speech and association because it applies to *all* such spending, including that which is actually uncoordinated with any

candidate. And, the independent political speech that is the principal target of the presumption is core First Amendment expression that, since *Buckley v. Valeo*, 424 U.S. 1 (1976), the Court has routinely protected against legislative efforts at prohibition or limitation in various contexts.

That the burden at issue is imposed by a procedural requirement of proof rather than a direct restraint on spending for speech does not relieve the presumption of constitutional significance. If unrebutted, the presumption converts constitutionally unlimitable speech into a contribution that is strictly limited by the VCFL, as well as into a limited expenditure by the candidate, and the VCFL imposes civil monetary penalties and other sanctions for breaches of those limits. But there is a "fundamental constitutional difference" between independent expenditures and contributions. *Colorado Republican Federal Campaign Committee v. Federal Election Commission*, 518 U.S. 604, 614-15 (1996). In *Colorado*, the Court struck down the Federal Election Commission's conclusive presumption that a political party's expenditures were coordinated with its candidates, treating the expenditures at issue as core First Amendment speech and finding no empirical basis for that presumption. The VCFL presumption concerns the same kind of speech and similarly lacks empirical support.

For First Amendment purposes the fact that the VCFL presumption is rebuttable does not distinguish it from the presumption invalidated in *Colorado*. Burdens of proof allocate the risks of prevailing or losing in litigation, and, therefore, must protect First Amendment interests just as must substantive standards of speech and conduct. In cases from *Speiser v. Randall*, 357 U.S. 513 (1958), to *Virginia v. Black*, 538 U.S. 343 (2003), the Court has invalidated procedures in administrative and judicial proceedings that imposed presumptions or other burdens of persuasion on those engaged in speech or association in a manner that chilled their consti-

tutionally protected activities and compelled them to prove that protection was due rather than required the state to prove that it was not. As established in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), and subsequent defamation cases, these same principles apply with equal force in litigation involving only private and not governmental parties.

The VCFL presumption takes the same sort of unconstitutional "shortcut" as those that the Court has repeatedly rejected, for it chills the speech and association of political committees, political parties and candidates lest they be compelled to account for themselves in court and bear the burden of proving that they acted independently from one another. And, that burden is even more severe where a political committee or party bears the burden of disproving a candidate's state of mind.

2. Due to the presumption's deleterious impact on core First Amendment activity, it could be justified only if Vermont can bear its burden to prove that it is narrowly tailored to serve a compelling governmental interest. But the presumption serves no legitimate state interest at all, Vermont did not clearly articulate one in the courts below, and the Court of Appeals identified none. The State's legitimate interest instead lies only in regulating actual coordination as a contribution, and the VCFL separately does that. The presumption does not serve an interest in preventing "circumvention" of the State's contribution limits because that justification applies only to the regulation of actual contributions, coordinated activities and solicitations, not the regulation of independent expenditures themselves. The lack of any empirical support for the presumption further undermines any contention that it is narrowly tailored even if a compelling governmental interest were asserted and discernable.

ARGUMENT

I. THE "RELATED CAMPAIGN EXPENDITURE" PRESUMPTION IMPOSES A BURDEN OF PROOF THAT IS INCONSISTENT WITH THE FIRST AMENDMENT

Although § 2809(d) does not explicitly speak in terms of burdens of proof, it plainly reverses the "ordinary default rule" in litigation that "plaintiffs bear the burden of persuasion regarding the essential aspects of their claims" and "the risk of failing to prove their claims." *Schaffer v. Weast*, 126 S. Ct. 528, 74 U.S.L.W. 4009, 4011 (Nov. 14, 2005). For, under § 2809(d), the plaintiff—whether the state or a candidate—bears the initial burden of production to show (a) the making of an "expenditure" by a political party or a political committee (b) that "primarily benefits" (that is, whose "principal purpose . . . is to promote," Rule 2000-1, Sec. 3(a)) "six or fewer candidates who are associated with [the party or committee]." At that point in the proceeding, the ultimate facts at issue—the spender's intent to promote the election or defeat of a candidate[8] and the spender's coordination with

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[8] Definitional § 2809(c) uses the phrase "intended to promote the election . . . or defeat" of a particular candidate or group of candidates as an element of the term "related campaign expenditure," but § 2809(d) uses a different formulation—"primarily benefits six or fewer candidates"—to describe when the presumption attaches, and Rule 2000-1, Sec. 3(a), defines the latter to mean having "the principal purpose . . . to promote six or fewer specific candidates." Thus, in contrast to § 2809(c) "inten[t]," the term "primarily benefits" may reach only a more exacting degree of intent—"principal" rather than any—and a less exacting range of expenditure objectives—promoting a candidate rather than specifically promoting the "election" or "defeat" of a candidate. If so, these differences mean that the plaintiff's burden of production requires showing something other than satisfaction of the intent element of § 2809(c), but meeting that burden nonetheless triggers the presumption that this intent element is satisfied. However, even if "primarily benefits" is precisely congruent with the § 2809(c) intent element, § 2809(d) imposes no burden of production on the plaintiff whatsoever regarding the *coordination* element of § 2809(c).

a candidate—are presumed, and, as Rule 2000-1, Sec. 3(d) explains, the presumption must be "overcome by evidence" to the contrary presented by the defendant in order for the defendant to prevail. *See generally Schaffer*, 74 U.S.L.W. at 4011; *Director, Office of Workers' Compensation Progams v. Greenwich Collieries*, 512 U.S. 267, 272-75 (1994). The Court of Appeals did not address the nature of the burden of proof imposed by the presumption, and its opinion, see *Landell v. Sorrell*, 382 F. 3d at 145-46, can be read to suggest that a defendant need only meet the plaintiff's burden of production with a production of its own, leaving the ultimate burden of persuasion on the plaintiff where the resulting evidence is "closely balanced." See *Schaffer v. Weast*, 74 U.S.L.W. at 4011. But the Court of Appeals ignored the actual operation of the presumption, particularly the state's authoritative construction of it in Rule 2000-1 quoted above.

In this constitutional challenge, this imposition of the burden of proof must be considered in its application to speech that occurs completely independently of a candidate, for the presumption explicitly applies to *all* speech by a political committee or a political party whose principal purpose is to influence the election of six or fewer candidates regardless of whether, in fact, that speech was coordinated with any candidate. Thus, every incident of such speech[9] entails the risk of entanglement in a judicial proceeding in which the speaker,

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Rather, that fact is presumed once the plaintiff meets his burden of production of showing an expenditure that "primarily benefits six or fewer candidates."

[9] Actually, neither the "primarily benefits" nor the "intended to promote" element requires that an "expenditure" refer to a candidate or, indeed, that it comprise a communication at all, and the VCFL definition of "expenditure" does not confine it to communications. See 17 V.S.A. § 2801(3). But at least where an expenditure entails speech or association, the § 2809(d) presumption of coordination implicates core First Amendment interests, as discussed in the text.

the candidate or both must disprove coordination. Section 2809(d) therefore imposes a burden on speech and association. See generally pp. 14-22, below; *see also Federal Election Commission v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 255-56 (1986) (relying on *Speiser v. Randall*, 357 U.S. 513 (1958) (discussed at pp. 18-19, below) in holding that a requirement that an independent non-profit ideological corporation use a highly regulated political committee for its independent expenditures may have the "practical effect . . . to discourage protected speech" and therefore is "an infringement on First Amendment activities").

Much of the speech that § 2809(d) burdens, and that is the presumption's evident principal target, comprises core First Amendment expression. "[D]ebate on the qualification of candidates is at the core of our electoral process and of the First Amendment freedoms, not at the edges." *Republican Party of Minnesota v. White,* 536 U.S. 765, 781 (2002) (interior quotation marks omitted). *See generally McConnell v. Federal Election Commission*, 540 U.S. at 205, 221; *Buckley v. Valeo*, 424 U.S. at 14, 39, 48; *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 272 (1971) ("[the] constitutional guarantee has its fullest and most urgent application precisely to the conduct of campaigns for political office"). Because independent advocacy regarding candidates is so highly valued, the Court, in a line of cases dating from *Buckley*, has "routinely struck down limitations on independent expenditures by candidates, other individuals and group . . ." *Federal Election Commission v. Colorado Republican Federal Campaign Committee ("Colorado II")*, 533 U.S. 431, 441 (2001). *See Colorado Republican Federal Campaign Committee v. Federal Election Commission ("Colorado I")*, 518 U.S. 604 (1996) (rejecting conclusive presumption that a state political party's independent expenditures were coordinated with its candidate for the United States Senate); *Federal Election Commission v. Massachusetts Citizens for Life, Inc.* (invalidating application of FECA prohibition of independent ex-

penditures by ideological non-profit corporation); *Federal Election Commission v. National Conservative Political Action Committee*, 470 U.S. 480 (1985) (invalidating Presidential Election Campaign Funding Act limit of $1,000 on spending by federal political committees "to further the election" of publicly financed candidates); *Buckley v. Valeo*, 424 U.S. at 39-51 (invalidating $1,000 limit on independent expenditures by any person).[10]

Section 2809(d) also burdens fundamental associational rights because it compels a candidate, political party or political committee to disclose information about its political activities and contacts with each other in order to "overcome" the presumption that a particular expenditure was coordinated. Yet coordination disputes often concern "the very heart of the organism which the First Amendment was intended to nurture and protect: political expression and association concerning . . . elections and office holding." *AFL-CIO v. Federal Election Commission*, 333 F. 3d 168, 170 (D.C. Cir. 2003) (interior quotation marks omitted). Absent the presumption, in many cases that person could rely upon a state or candidate plaintiff's failure to present evidence concerning that conduct and prevail at that point against the coordination allegation.[11]

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[10] The sole exceptions to this line of authority are the Court's holdings concerning independent expenditures by corporations, *see Austin v. Michigan Chamber of Commerice, Inc.*, 494 U.S. 652 (1990), and election-proximate broadcast references to candidates by corporations and labor organizations. See *McConnell v. Federal Election Commission*, 540 U.S. at 203-11.

[11] In some cases under § 2809(d) the plaintiff can very easily meet its initial burden of production. Where the expenditure at issue includes express advocacy of election or defeat, and perhaps other speech formulations, the plaintiff can meet that burden and rest its affirmative case-in-chief simply by introducing the communication itself, for that would show the requisite "primar[y] benefit" to a candidate that triggers the presumption of coordination. The defendant must then either lose, or put on evidence to

Section 2809(d) further impairs freedom of association by creating an improper incentive for a candidate to file an action against his opponent and his opponent's perceived allies in order to force them to publicly account for their activities and contacts at acute risk to themselves if they fail to do so. *Cf. id.* at 178 (Federal Election Commission ("FEC") procedure of placing closed investigative files on public record implicates First Amendment concerns by creating incentive for persons to file complaints against political adversaries as a means both to chill their expression and to learn their political strategies so it can be exploited to the complainant's advantage). *See also Gibson v. Florida Legislative Investigation Committee*, 372 U.S. 539, 557-58 (1963); *Sweezy v. New Hampshire*, 354 U.S. 234, 245 (1957); *id.* at 265-66 (Frankfurter, J., concurring); *Federal Election Commission v. Christian Coalition, Inc.*, 52 F. Supp. 2d at 88-92.[12]

That the burden at issue here is imposed by a procedural requirement of proof in litigation rather than by a direct prohibition or amount limitation on spending for speech does not

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rebut the presumption, whereas absent the presumption the defendant could have prevailed at that point in the proceeding without making any further demonstration concerning its political and associational activities.

[12] In *McConnell v. Federal Election Commission*, 540 U.S. at 219-23, the Court rejected a challenge to § 214(c) of the Bipartisan Campaign Reform Act of 2002, 116 Stat. 81, codified at 2 U.S.C. § 441a(a) note, which provided that "agreement or formal collaboration" were not necessary elements of coordination under FECA, reasoning in part that such a requirement in itself would not preclude intrusive coordination investigations. *But cf. Colorado II*, 533 U.S. at 471 n. 3 (Thomas, J., concurring) (enforcement of coordination rules "inevitably . . . involves an intrusive and constitutionally troubling investigation of the inner workings of political [actors]") (interior quotation marks omitted). In contrast, the VCFL presumption inevitably compels a political committee or party to present evidence concerning its political and associational conduct, subjecting itself to cross-examination and other process, lest it be held to have engaged in coordination and endure the resulting attributions that contributions to and expenditures by candidates were made.

relieve it of constitutional significance. For, one effect of the presumption, if unrebutted, is to convert constitutionally *unlimitable* independent speech into a strictly limited *contribution* under the VCFL, despite there being a "fundamental constitutional difference" between independent expenditures and contributions. *See Colorado I*, 518 U.S. at 614-15. *See also McConnell v. Federal Election Commission*, 540 U.S. at 134-35. In *Colorado I*, 518 U.S. at 620, the Court followed this distinction in striking down a FECA provision that imposed amount limits on political party independent expenditures, for "[t]he independent expression of a political party's views is 'core' First Amendment activity no less than is the independent expression of individuals, candidates, or other political committees." *Id.* at 616.

In doing so, the Court rejected the FEC's rationale in support of the limit that "*all* party expenditures are 'coordinated'" with the party's candidates, *id.* at 619 (emphasis in original), because, in the FEC's words, "'[political] party officials will as a matter of course consult with the party's candidates before funding communications intended to influence the outcome of a federal election.'" *Id.* at 620. The Court found no evidence to support that proposition, *id.* at 620-21, and pointedly observed that "[a]n agency's simply calling an independent expenditure a 'coordinated expenditure' cannot (for constitutional purposes) make it so." *Id.* at 621-22.

VCFL § 2809(d)'s presumption of coordination between state candidates and political parties rests on no firmer empirical basis, and its identical presumption regarding coordination between candidates and non-party, non-candidate political committees strays even farther afield from the realms of fact and plausibility.[13] We are aware of no record evi-

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[13] Section 2809(d) does refer to candidates as being "associated with the political party or political committee making the expenditure," but the term "associated" is undefined, and in *Colorado I* association in the sense

dence, and no judicial authority, supporting the notion that a speaker who advocates the election or defeat of six or fewer (or any other number of) candidates is any more likely to have coordinated with them than a speaker who explicitly advocates the election of more candidates or, indeed, of a party's entire ticket. *Cf. Tot v. United States*, 319 U.S. 463, 467-68 (1943) (statutory presumption of proof of fact cannot be sustained under Due Process Clause where inference is so strained as not to bear a reasonable relation to the circumstances of life as we know them).

And, for purposes of First Amendment application, the rebuttability of the VCFL presumption provides no pertinent analytical distinction from the conclusive presumption at issue in *Colorado I*, both because the Court's evidentiary analysis there did not turn on that conclusiveness and because, as the Court has frequently recognized, the First Amendment may be infringed as much by arbitrary burdens of proof as by direct prohibition or limitation.

"[I]t is important to ensure not only that . . . substantive First Amendment standards are sound, but that they are applied through reliable procedures. This is why . . . some procedures—a particular allocation of the burden of proof, a particular quantum of proof, a particular type of appellate review, and so on—[are] constitutionally required in proceedings that may penalize protected speech." *Waters v. Churchill*, 511 U.S. 661, 669 (1994). "The procedures by which the facts of [a] case are determined assume an impor-

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of a state party's nomination of candidates and overt coordination with its candidates of some activities did not warrant a presumption that *all* of the party's activities were coordinated with those candidates. Accordingly, no coordination of any specific expenditure can be assumed as to candidates and the non-party political committees with which they "associate." In any event, the First Amendment cannot abide the conversion of core independent speech into "contributions" simply because there is other "associat[ion]" between the spender and the candidate.

tance fully as great as the validity of the substantive rule applied," and "the more important the rights at stake, the more important must be the procedural safeguards surrounding those rights." *Speiser v. Randall*, 357 U.S. at 520-21. And, in all litigation, "[t]he more stringent the burden of proof a party must bear, the more the party bears the risk of an erroneous decision." *Cruzan v. Director, Missouri Dept. of Health*, 497 U.S. 261, 283 (1990).

In *Speiser v. Randall*, the Court held unconstitutional a state's imposition on a taxpayer of the burden of persuasion, both administratively and in court, as to his eligibility for a tax exemption because he refused to sign an oath disclaiming advocacy of the unlawful overthrow of the government, where taxpayers who signed the oath were deemed to be eligible. The Court reasoned that because "[t]here is always in litigation a margin of error, representing error in factfinding, . . . [w]here the transcendent value of speech is involved, due process certainly requires in the circumstances of this case that the state bear the burden of persuasion. . . ." *Id.* at 525-26. For, placing the burden instead on the taxpayer "will create the danger that the legitimate utterance will be penalized. The man who knows that he must bring forth proof and persuade another of the lawfulness of his conduct necessarily must steer far wider of the unlawful zone than if the State must bear these burdens," a problem that is exacerbated where "the complexity of the proofs and the generality of the standards applied" require the speaker to "prov[e] the negative of . . . complex factual elements." *Id.*

> In practical operation, therefore, this procedural device must necessarily produce a result which the State could not command directly. It can only result in a deterrence of speech which the Constitution makes free. "It is apparent that a constitutional prohibition cannot be transgressed indirectly by the creation of a statutory presumption any more than it can be violated by direct enactment. The power to create presumptions is not a means

> of escape from constitutional restrictions." *Bailey v. State of Alabama*, 219 U.S. 219, 239 [1911]. . . . [W]e hold that when the constitutional right to speak is sought to be deterred by a State's general taxing program due process demands that the speech be unencumbered until the State comes forward with sufficient proof to justify its inhibition. The State clearly has no such compelling interest at stake as to justify a short-cut procedure which must inevitably result in suppressing protected speech.

Id. at 526, 529-30.

The Court employed similar reasoning and language when it invalidated, under the First and Fourteenth Amendments, a felony trial jury instruction that a defendant's public burning of a cross (the first element of the offense at issue) was "prima facie evidence of [the defendant's] intent to intimidate a person or group" (the second element). See *Virginia v. Black*, 538 U.S. at 348. The Court reasoned that this evidentiary rule "makes no effort to distinguish among . . . different types of cross burnings," including those that reflect "core political speech," and because it "ignores all of the contextual factors that are necessary to decide whether a particular cross burning is intended to intimidate, it permits the jury to convict in every cross-burning case in which defendants exercise their constitutional right not to put on a defense"; the prospect of such a prosecution "chills constitutionally protected speech," and "[t]he First Amendment does not permit such a shortcut." *Id.* at 365-67. *See also Dombrowski v. Pfister*, 380 U.S. 479, 494-96 (1965) (state law requiring members of "communist-front organizations" to register as such rests on unconstitutional rebuttable presumption that groups that are so designated by various federal authorities are such organizations); *Freedman v. Maryland*, 380 U.S. 51 (1965) (state law violated First Amendment by imposing burden on film exhibitors to initiate judicial proceedings and bear burden of persuasion in court on claim that film was improperly disapproved by state censorship board).

The § 2809(d) presumption takes a comparably unconstitutional "shortcut" in placing a political committee or party to the chilling choice of engaging in speech at the risk of having to prove that it did so without coordination. And, the burden here is even more onerous than that which confronted the taxpayer in *Speiser*. There, at least, the taxpayer had "only" to present evidence about his own conduct. But under § 2809(d), a political committee or party may have to disprove a *candidate's* lack of any knowledge or "willful blindness" as to what the committee or party did, because § 2809(d) "presume[s]" one or the other, see Rule 2001, Sec. 2(a)—a daunting task at the very least.[14]

The Court rejected a presumption of disfavored association less exacting than § 2809(d) in *Healy v. James*, 408 U.S. 169 (1972). There, a state-supported college disapproved an application of the campus chapter of Students for a Democratic Society ("SDS") for official recognition, which entailed privileges to hold meetings and carry out other activities on the campus, in part because the group did not demonstrate that it was unaffiliated with the national SDS. *Id.* at 172-77. The Court held that in doing so the college had "misplac[ed] the burden of proof," *id.* at 185, because, in light of the First Amendment associational rights that hinged on approval, once the group completed the application the college more appropriately bore the burden to demonstrate both that the group was affiliated with national SDS and that such affiliation warranted rejection. *Id.* at 183-84. Similarly, in light of

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[14] Moreover, insofar as § 2809(e) eliminates even a plaintiff's burden of production in a subsequent proceeding concerning the same "related campaign expenditure," see p. 8 above, "[d]ecisions that place the *entire* burden of persuasion on the opposing party at the *outset* of a proceeding —as [respondents] urge [the Court] to do here—are extremely rare." *Schaffer v. Weast*, 74 U.S.L.W. at 4011 (emphasis in original). For the reasons explained in the text, this aspect of the VCFL scheme does not present one of those "extremely rare" occasions when such placement is justified.

the First Amendment interests at stake here, forcing a political committee, political party or candidate to prove its non-coordination with others unconstitutionally places the burden of persuasion on the wrong party.

The fact that some litigation entailing the § 2809(d) presumption may be waged only by private parties does not alter the First Amendment analysis; rather, the same principles apply equally to burdens of proof in private litigation. Thus, in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), the Court rejected, under the First and Fourteenth Amendments, a state law that created presumptions that a plaintiff public official's personal reputation was injured and that he sustained damages simply by the official's showing that the defendant made certain statements about the agency of which the official was in charge; the defendant could rebut these presumptions only by carrying the burden of persuasion as to the truth of his statements. *Id.* at 267. The Court equated the "inhibiting" fear of a civil damages award with fear of criminal prosecution, *id.* at 277, and concluded that the state's presumptions, despite the defendant's opportunity to rebut them, impermissibly would cause "self-censorship":

> [W]ould-be critics of official conduct may be deterred from voicing their criticism, even though it is believed to be true and even though is in fact true, because of doubt whether it can be proved in court or fear of the expense of having to do so. They tend to make only statements which "steer far wider of the unlawful zone." *Speiser v. Randall,* [357 U.S. at 526]. The rule thus dampens the vigor and limits the variety of public debate.

Id. at 279. Similarly, in a subsequent series of First Amendment decisions in the defamation field, the Court has determined the nature and allocation of burdens of proof in order to "tip the scales" "in favor of protecting true speech." *See Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 771-77 (1986). "[T]he need to encourage debate on public issues

that concerned the Court in the governmental-restriction cases is of concern in a similar manner in [a] case involving a private suit for damages"; placing the burden on the speaker to prove "truth" exerts a "chilling effect [that is] antithetical to the First Amendment's protection of true speech on matters of public concern." *Id.* at 777.

By the same token, then, § 2809(d)'s imposition on a defendant of the burden of persuasion as to coordination with a candidate, on pain of civil penalties and candidate forfeiture of public funding, exerts an unacceptable chilling effect on independent political speech and association. Placing that burden instead on the plaintiff is necessary to protect core First Amendment expression that § 2809(d) improperly presumes lacks independence and subjects to those potentially onerous sanctions.

II. THE PRESUMPTION IS NOT NARROWLY TAILORED TO SERVE A COMPELLING GOVERNMENTAL INTEREST

Because of its deleterious impact on political expression, the VCFL presumption could be upheld only if the State can meet its "burden to prove that [it] is (1) narrowly tailored to serve (2) a compelling state interest." *See Republican Party of Minnesota v. White*, 536 U.S. at 774-75. *See also McConnell v. Federal Election Commission*, 540 U.S. at 204-05; *Austin v. Michigan Chamber of Commerce, Inc.*, 494 U.S. at 659-60. But the presumption serves no legitimate governmental interest at all, the State did not clearly articulate one in the courts below, and the Court of Appeals did not advert to one. See *Landell v. Sorrell*, 382 F. 3d at 145-46. Rather, the State's sole relevant legitimate interest lies in regulating *actual* coordinated in-kind contributions, and § 2809(a)'s inclusion of "related campaign expenditures" within the scope of the term "contribution" under the VCFL precisely serves that interest.

To be sure, the Court has recognized that some measures to prevent "circumvention" of a contribution limit serve the compelling governmental interest in dealing with corruption, but the Court has so approved only restraints on actual contributions, coordinated activities and solicitations. *See, e.g., McConnell v. Federal Election Commission*, 540 U.S. at 145, 163, 165, 174-175; *Colorado II*, 533 U.S. at 441-42. In *Buckley v. Valeo*, 424 U.S. at 47, the Court rejected "preventing circumvention" as a justification for FECA's then-$1,000 limit on independent expenditures themselves because, "[r]ather than preventing circumvention of the contribution limitations, [the independent expenditure limit] severely restricts all independent advocacy despite its substantially diminished potential for abuse." *See also Colorado I*, 518 U.S. at 613-18. Likewise, the VCFL's placement of a thumb on the litigation scale in order to relieve the state and private litigants of the burden to persuade a court that a coordinated in-kind contribution occurred does not "prevent circumvention," but instead indiscriminately adversely affects all those whose speech is truly independent, not just those who, in fact, coordinated.

It follows that even if a compelling governmental interest in the presumption were asserted and discernable, the presumption is irrationally designed and not tailored to serve any. As already discussed, there is no empirical evidence to support it, and its application at the threshold of "six or fewer" candidates is both arbitrary and unrelated to any plausible feature of an expenditure that would objectively render it more likely to be coordinated than if it promoted a greater number of candidates. *Cf. Iowa Right to Life Committee, Inc. v. Williams*, 187 F. 3d 963, 968 (8th Cir. 1999) (rejecting as not narrowly tailored to serve asserted anti-corruption and other interests a similar state law requiring candidates either to disavow and "correct[]" a group's independent expenditures, or to refrain from doing so, be presumed to have approved the expenditures, and have the expenditures attrib-

uted as the candidate's own). Absent narrow tailoring in service of a compelling governmental interest, the "[a]ccountability" for coordination imposed by § 2809(d) on political committees, political parties and candidates cannot be sustained under the First and Fourteenth Amendments.

CONCLUSION

The Court should reverse the judgment below.

Respectfully submitted,

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